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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1465

A. M. FRANCO,
Petitioner,

versus

STEIN STEEL & SUPPLY COMPANY,
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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## INDEX


Page

Opinions below ..... 1

Jurisdiction ..... 2

Questions presented ..... 2

Constitutional provisions involved ..... 2

Statement of the case ..... 2

Summary of reasons for refusal of the writ ..... 3

Argument ..... 4

Conclusion ..... 11


### Cases Cited


Ackermann v. United States, 340 U.S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1959) ..... 10

Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza, 391 US 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968) ..... 6

Carroll v. President & Commissioners of Princess Anne, 393 US 175, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968) .....8, 10

Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) ..... 10

Faye v. Noia, 372 US 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963) ..... 4

Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 85 L. Ed. 725, 61 S. Ct. 513 (1941) .. 9

Liner v. Jafco, Inc., 375 US 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964) ..... 8

Local No. 438 v. Curry, 371 US 542, 9 L.Ed. 2d 514, 83 S. Ct. 531 (1963) ..... 6

Love & Ballor Corp. v. Western Well Works, Inc., 261 US 387, 67 L. Ed. 712, 43 S. Ct. 422 (1923) .. 5

Magnum Import Co. v. De Sportuno Coty, 262 US 159, 67 L. Ed. 922, 43 S. Ct. 531 (1923) ..... 4

Mercantile National Bank v. Langdeau, 371 US 555, 9 L.Ed. 2d 523, 534, 83 S. Ct. 520 (1963) ..... 6

Michel v. Louisiana, 350 U.S. 91, 100 L. Ed. 83, 76 S. Ct. 158 (1955) ..... 10

Mitchell v. Hayden, Stone, Inc., 225 Ga. 711 (1969).. 8

Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., Inc., 344 US 178, 97 L.Ed. 204, 73 S. Ct. 196 (1952) ..... 7

Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931) .... 9

Pope v. Atlantic Coast Line Railroad Co., 345 US 379, 97 L.Ed. 1094, 73 S. Ct. 749 (1953) ..... 6

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955) ..... 4

Rothschild v. Knight, 184 U.S. 334, 46 L. Ed. 573, 22 S. Ct. 391 (1902) ..... 9

Schroeder v. New York, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279 (1962) ..... 9

State of Ohio v. Wyandotte Chemical Corporation, et al., ... U.S. ..., 39 L. Week 4323 [No. 41, October Term, 1970; decided March 23, 1971] ..... 4

Whitus v. Georgia, 385 US 545, 17 L. Ed. 2d 599, 87 S. Ct. 643 (1967) ..... 7

## Statutes Cited

28 USCA, § 1257 ..... 2, 3, 5, 6

Constitution of the United States, 14th Amendment.. 2

Constitution of the United States, Article III ..... 8

Judiciary Act of 1789, 1 Stat. 85, § 25 ..... 7

## Text Cited

Wright, Handbook of the Law of Federal Courts, § 105 (2d ed. 1970) ..... 4

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### OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 227 Ga. 92 (App. A of Petition). The Motion for Rehearing and decision thereon are appended to the petition (App. B). The Judgment of the Superior Court of Fulton County, Georgia, is appended to the petition (App. C & D). The stay of the remittitur is appended to the petition (App. E).

## JURISDICTION

The jurisdictional requisite as set forth in the petition is insufficient as discussed in argument, Section B, infra.

## QUESTIONS PRESENTED

1. Does the petition present any special or important reasons for review?

2. Is the order from which review is sought final within the meaning of 28 USCA, § 1257?

3. Are the questions raised herein moot?

4. Have petitioner's 14th Amendment rights been violated?

5. Has petitioner waived any rights with respect to the challenged order?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions are adequately set forth in the petition.

## STATEMENT OF THE CASE

The statement of facts as stated in the petition is inaccurate in the following respects:

(a) There was an adequate reason for failure to notify petitioner of the entry of the July 2, 1970 orders;

(b) Petitioner failed to comply with the July 2, 1970 ex parte orders of which he now complains; and,

(c) Petitioner, not the Supreme Court of Georgia, as petitioner implies, relied upon the case **Murphy v. Murphy**, 214 Ga. 602 on the motion for rehearing.

## I

## SUMMARY OF REASONS FOR REFUSAL OF THE WRIT

The petition for a writ of certiorari should be denied for the following reasons:

(a) The petition does not present any special or important reasons for granting review in that:

(1) The question is merely of interest to the litigants; and

(2) The question is an episodic one not of constitutional dimensions.

(b) The order sought to be reviewed is not a final order and therefore not reviewable pursuant to 28 USCA, § 1257.

(c) The issue raised in the petition is moot and need not be considered;

(d) There has been no violation of any federally protected right; and

(e) If this Honorable Court is of the opinion that the order in question did violate petitioner's federally protected rights, petitioner has waived the same by failing to assert them in a timely manner.

## II

## ARGUMENT

### (A)

The petitioner raises no issues meriting consideration and review should not be granted. This Honorable Court is the primary overseer of matters of federal law and national import. **State of Ohio v. Wyandotte Chemical Corporation, et al,** ... U.S. ..., 39 L. Week 4323 [No. 41, October Term, 1970; decided March 23, 1971]. A petition for writ of certiorari is not a normal appellate channel to be resorted to by litigants who seek a determination on their case by the highest Court of this land. **Magnum Import Co. v. De Sportuno Coty,** 262 US 159, 67 L. Ed. 922, 43 S. Ct. 531 (1923). A principal purpose of the Congressional authority[1] affecting review by this Honorable Court was to lessen the burden of this Honorable Court and to put the Court in control of its own docket by restricting the number of cases which fall before this Court for review. **Wright, Handbook of the Law of Federal Courts,** §105 (2d ed. 1970).

With the passage of the Judges Bill of 1925, Rule 19 was promulgated to guide the Court and litigants as to the Court's standards for granting writ of certiorari. **Faye v. Noia,** 372 US 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). The predominate criteria under Rule 19, is whether or not the petition presents any special and important reasons for granting the writ. **Faye v. Noia,** *supra.* In interpreting the guidelines, this Court in **Rice v. Sioux City Memorial Park Cemetery,** 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955), stated:

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[1] Evarts Act of 1891, creating the various United States Courts of Appeals; the Judicial Code of 1911, abolishing the "old" circuit courts; and the Judges Bill of 1925, limiting appeals to this Honorable Court, and substituting the discretionary writ of certiorari.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem but this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants [citations]. Special and important reasons imply a reach to the problem beyond the academic or the episodic. This is especially true when the issues involved reach constitutional dimensions, for there comes into play regard for the Court's duty to avoid decisions and constitutional issues unless avoidance becomes evasion."

The Rule and the decisions of this Honorable Court clearly reflect that the granting of review is to settle issues of public importance and not merely to resolve a dispute between the parties. **Love & Ballor Corp. v. Western Well Works, Inc.**, 261 US 387, 67 L. Ed. 712, 43 S. Ct. 422 (1923).

The question then is what special and important reasons warrant review. As the special and important reason for review, petitioner asserts that he is being subjected to a psychological disadvantage in a weak case and therefore the order complained of should not have been entered (**Petitioner's Brief**, p. 12). It is clear that petitioner's assertions are related only to his private rights now in dispute. There is no substantial public issue which presents any special or important reason for review, and therefore the petition should be denied.

(B)

The challenged order is not a final order within the meaning of 28 USCA, § 1257, and should not be reviewed. Review by way of certiorari to the highest courts of the states is limited to final orders, judgments or decrees. 28

USCA, § 1257. The requirement of a final order is more than a technical rule of procedure yielding where necessary to the exigencies of particular situations. It represents a longstanding and healthy policy of abstention which protects litigants and courts from the disruption of interlocutory review. It further restrains this Honorable Court from passing on Constitutional questions that may dissipate by the final outcome of the case and thereby minimize undesirable federal-state conflicts. **Mercantile National Bank v. Langdeau**, 371 US 555, 9 L.Ed. 2d 523, 534, 83 S. Ct. 520 (1963) (Justice Harlan, dissent).

The issue presented to this Court is not raised by a final order under federal standards. The issue does not turn on the jurisdiction or venue of the Court below. See **Local No. 438 v. Curry**, 371 US 542, 9 L.Ed. 2d 514, 83 S. Ct. 531 (1963); **Mercantile National Bank v. Langdeau**, *supra*. Here, regardless of this Honorable Court's determination, the state trial court has jurisdiction over the subject matter of this cause and over the person of petitioner. Even if the Court below erred, the case will go forward. The litigants do not face the risk of finding their efforts nullified by improper jurisdiction nor would they be required to relitigate the cause if the order below were ultimately found erroneously entered. Petitioner does not assert that he has no further defense and therefore, as a practical matter, the order is final. See **Pope v. Atlantic Coast Line Railroad Co.**, 345 US 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953). Nor does petitioner assert that the order below effectively terminates the litigation. See **Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza**, 391 US 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968).

The order before this Honorable Court is clearly interlocutory under federal standards. The statute requiring final orders is designed to avoid piecemeal review of

interlocutory orders. This Honorable Court throughout its history has regularly and continuously declined review in cases as the instant case. **Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., Inc.**, 344 US 178, 97 L. Ed. 204, 73 S. Ct. 196 (1952). The requirement of finality has remained as a part of our working system of jurisprudence since the passage of the Judiciary Act of 1789, 1 Stat. 85, § 25. See **Ledbetter**, *supra*. The temporary restraining order entered in the instant case, as an order denying a demurrer, is an interlocutory order and therefore not subject to review. See **Whitus v. Georgia**, 385 US 545, 17 L. Ed. 2d 599, 87 S. Ct. 643 (1967).

(C)

The issue raised by the petition is moot. Petitioner contends that his rights of due process and equal protection were violated when the trial court entered an ex parte order requiring him to turn over certain papers, the ownership of which were in controversy, to a special auditor (and receiver) who would in turn hear evidence with respect to the same. The order entered July 2, 1970, required petitioner to turn over records to the auditor which were owned by your respondent or which were prepared by petitioner in violation of his fiduciary duty to your respondent. At a hearing before the auditor, petitioner appeared without objection and produced certain records which respondent stipulated could be retained by petitioner. Petitioner refused to produce other records which were within the ambit of the July 2, 1970, order. No effort was made to cite petitioner for contempt in regard to said order. Instead, on July 21, 1970, this cause came on to be heard after due notice at which time petitioner was heard. At that hearing, which was also in the nature of a temporary restraining order, the order of

reference was modified pursuant to petitioner's request whereby petitioner was allowed to retain records which he claimed were necessary in the ordinary operation of his business. No objection as to notice was made at that time.

Petitioner does not assert that a reference of the cause violates any constitutional right but merely that the order of reference by reason of its ex parte nature was unconstitutional. It is clear, however, that this issue is now moot in that petitioner received notice and had an adequate opportunity to be heard on the propriety of the reference. **Mitchell v. Hayden, Stone, Inc.**, 225 Ga. 711 (1969).

The mootness doctrine stems from the constitutional requirement under Article III of the Constitution of the United States wherein the exercise of judicial powers is limited to actual cases or controversies. **Liner v. Jafco, Inc.**, 375 US 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964). Unlike **Carroll v. President & Commissioners of Princess Anne**, 393 US 175, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968) where the petitioners were regularly faced with the impediments by reason of then expired temporary restraining order, there is no continuing effect in the instant case. At no time prior to said hearing was petitioner in any way affected by said order—other than his mere appearance before the auditor. Petitioner was afforded notice and an opportunity to be heard with respect to the order in question. As a direct result, the order was modified to permit petitioner to operate his business. Therefore, the ex parte character of the original order was therefore clearly merged into the July 21, 1970, order of modification. It is absolutely clear that the issues in the instant case have progressed to a point where the order petitioned from is merely a whisper from the past arousing an old, almost forgotten, memory. The order, in short, is moot.

(D)

The order appealed from did not violate petitioner's Constitutional rights. Petitioner relies upon **Mullane v. Central Hanover Bank and Trust Co.**, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1960). The case stands for the proposition that due process precludes the taking of property without notice and an opportunity to be heard and that the notice afforded must be reasonably calculated to inform. **Mullane** was clarified in **Schroeder v. New York**, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279 (1962) where this Honorable Court indicated that due process required adequate notice and an opportunity to be heard before the proceeding could be afforded any finality. Certain forms of pre-judgment interference with property prior to notice and hearing are permissible, i.e., attachment or replevin. See **Rothschild v. Knight**, 184 U.S. 334, 46 L. Ed. 573, 22 S. Ct. 391 (1902); **Phillips v. Commissioner of Internal Revenue**, 283 U.S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931). See also **Huron Holding Corp. v. Lincoln Mine Operating Co.**, 312 U.S. 183, 85 L. Ed. 725, 61 S. Ct. 513 (1941).

There are several important factors which should compel this Honorable Court to deny certiorari. First, the order of reference did not deprive petitioner of any property or use thereof without and prior notice or an opportunity to be heard. Petitioner was afforded ample notice to appear and present evidence with respect to ownership of the documents involved. Further, the record amply reflects no property was, in fact, ever taken from him. Finally, special circumstances were presented before the trial court in granting the order. Petitioner had regularly and wrongfully violated his fiduciary duty to Respondent. The record reflects diversion of business for petitioner's personal gain and retention of property belonging to respondent. Respondent's property called for

in the order was and is primarily drawings and plans. Therefore, its rights were but one strike of a match away from being lost forever. Under such circumstances, immediate relief was proper. In **Carroll v. Commissioners of Princess Anne**, *supra*, Justice Fortas for the Court wrote:

> "There is a place in our jurisprudence where exparte issuance without notice, of temporary restraining orders of short duration; . . . 393 U.S. 180, 21 L. Ed. at 330-31.

This is precisely the type of case where the exception to notice applies (assuming there had been compliance with the trial court's order). The order was emergency in nature. Notice would have precluded the relief sought. The intrusion upon petitioner's right to use property which the proof may ultimately reflect is his, was not severely restricted. Finally, even as reasonable as the order is, it has not been complied with but instead has been thwarted and evaded. Under these circumstances, it is your respondent who is aggrieved, not petitioner, and review should be denied.

(E)

Petitioner has waived any rights he may have had with respect to the order upon which the petition is predicated. It is well established that constitutional rights may be waived by a failure to assert them in a timely fashion. **Michel v. Louisiana**, 350 U.S. 91, 100 L. Ed. 83, 76 S. Ct. 158 (1955). See also **Ackermann v. United States**, 340 U.S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1959). Where the law is established and trial counsel fails to assert any right he may have on behalf of his client, the right is waived and forever lost. See **Curtis Publishing Co. v. Butts**, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). Here, petitioner asserted the rights referred to

herein for the first time on appeal to the Georgia Supreme Court. This was obviously untimely and amounts to a waiver. Therefore, there is nothing for this Court to review and certiorari should be denied.

## III

## CONCLUSION

For the foregoing reasons, respondent urges that the writ of certiorari not be granted.

Respectfully submitted

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